IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-420

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*

No. 77-421

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*

No. 77-436

FEDERAL COMMUNICATIONS COMMISSION

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITIONERS' SUPPLEMENTAL BRIEFS

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IN THE

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OCTOBER TERM, 1977

Nos. 77-420, 77-421 and 77-436

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, AND FEDERAL COMMUNICATIONS COMMISSION,
Petitioners

v.

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., AND N-TRIPLE-C INC.,
Respondents

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITIONERS' SUPPLEMENTAL BRIEFS

In supplemental briefs, filed December 30, 1977, American Telephone and Telegraph Company (AT&T) and the Federal Communications Commission (FCC) brought to the Court's attention several prefatory sentences in a decision issued by the Court of Appeals for the Second Circuit on December 21, 1977. *Western Union International, Inc.* v. *FCC*, Nos. 77-4183, 77-4184 and 77-4191. The purpose of these filings was to bolster an obviously weak assertion that there exists conflict among various

of the Circuit Courts. The present filings merely highlight the substantive paucity of the claim of conflict.

As the FCC correctly observed, the "quoted language was not the holding of the case, nor was it an essential premise to the decision."

What AT&T and the FCC failed to mention was that the existence of the present controversy was not even disclosed to the Second Circuit, nor did AT&T or the Commission even advise the Second Circuit of the existence of the District of Columbia Circuit's *Execunet* decision, despite the fact that the Second Circuit case was briefed months after the D.C. Circuit issued its decision. In fact, none of the parties to the Second Circuit appeal (who included AT&T, the FCC and four international record carriers) informed the Second Circuit of the existence of the Execunet dispute and its resolution by the D.C. Circuit. Clearly none of the parties to that case had any incentive to do so. The Second Circuit apparently accepted an uncontested description of what the *Specialized Carrier* decision was all about and used it, in passing, as a minor element in its description of the background of the case before it. The matters presented to the Second Circuit were far removed from the ones involved here, with the result that the court had no occasion to focus upon the questions presented in the *Execunet* case.[1] The appeals by the international record carriers involved completely different issues—and apparently far simpler ones than were decided by the D.C. Circuit.[2]

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[1] The Second Circuit was addressing the quite different question of whether the FCC had properly ordered AT&T to eliminate a discrimination by which it charged the international record carriers lower rates under contracts than it charged for similar services provided to other common carriers under tariff.

[2] The Second Circuit was able to issue its decision only two weeks after oral argument in that case. Indeed, the FCC's brief to the Second Circuit was filed on December 1, 1977—only twenty days before the decision was issued.

It does a grave disservice to the Second Circuit to imply, before this Court, that it has taken a position at odds with a sister court regarding a controversy about which parties on one side of this case failed to inform it—and one which was clearly not at issue before the Second Circuit in any way. The FCC seeks to compound the matter when it represents to this Court that the Second Circuit Court of Appeals "has construed Specialized Common Carrier Services authorizations as limited to private line services" and that this places it "in direct conflict with the holding of the District of Columbia Circuit that the authorizations are not limited." As the FCC well knows, the "authorizations" of the specialized common carriers were not before the Second Circuit and the latter undertook no analysis of the *Specialized Carrier* decision, merely citing it *once* in the passage quoted here by petitioners.

The weakness of the Petitioners' entire case is sharply illuminated by their effort to make capital of an inaccurate, wholly innocent, recital in a decision of another court in a quite different setting. It is quite clear that the Second Circuit, like the Ninth and Third Circuits, in the cases earlier cited by petitioners, has not addressed the questions resolved by the D.C. Circuit in this case and is therefore not in conflict with the decision below.

CONCLUSION

For the reasons stated above and in MCI's Brief for the Respondents in Opposition, the Petition for Certiorari should be denied.

Respectfully submitted,

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